

FINAL REPORT OF THE COMMISSION ON COURTS



**Indiana Legislative Services Agency
200 W. Washington St., Suite 301
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November, 2001

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2001

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Mark Goodpaster, Fiscal Analyst
Andrew Roesner, Staff Attorney

A copy of this report is available on the Internet. Reports, minutes, and notices are organized by committee. This report and other documents for this Committee can be accessed from the General Assembly Homepage at <http://www.state.in.us/legislative/>.

FINAL REPORT

Commission on Courts

I. STATUTORY AND LEGISLATIVE COUNCIL DIRECTIVES

In 1991, the Indiana General Assembly enacted IC 33-1-15-7 directing the Commission to annually do the following:

- (1) Review and report on all requests for new courts or changes in jurisdiction of existing courts.
- (2) Conduct research concerning requests for new courts or changes in jurisdiction of existing courts.
- (3) Conduct public hearings throughout Indiana concerning requests for new courts or changes in jurisdiction of existing courts.
- (4) Review and report on any other matters relating to court administration that the Commission determines appropriate, including court fees, court personnel, salaries of court officers and personnel, jury selection, and any other issues relating to the operation of the courts.

In 2001, the Legislative Council assigned to the Commission the charge to study the right of indigent persons to receive a pauper attorney in civil actions (based on the charge in HR 137-01).

II. INTRODUCTION AND REASONS FOR STUDY

The General Assembly and the judiciary are separate and co-equal branches of government. The Commission on Courts was established to give the General Assembly adequate time to study legislative proposals that will affect the judicial branch.

The issue of the right of a pauper attorney in civil actions was assigned as a result of efforts to address this issue during the sessions of the 2000 and 2001 General Assembly and due to several court cases on appeals that reaffirmed the right of any indigent person to receive a pauper attorney, either paid through public funds or through an attorney who would do the work pro bono.

Two additional issues were examined by the Commission on Courts. First, the issue of protective orders was examined because a committee of judges, prosecuting attorneys, and other interested parties examined whether protective orders should be limited to cases involving domestic violence.

Second, the costs of court operations are increasing at a faster rate than the revenues that are generated by court operations. Consequently, some counties are interested in allowing the

courts to charge for additional costs associated with jury trial in civil cases and post judgment actions.

III. SUMMARY OF WORK PROGRAM

Before the first meeting of the Commission, the Chairman sent a letter to each state legislator asking what proposals for new courts and court officers the legislators wanted the Commission to study. The Commission received a number of requests.

The Commission met four times during the 2001 interim.

In its first meeting, the Commission reviewed the outcome of legislation that it recommended during the 2001 General Assembly.

At the second meeting, the Commission examined the issue of the right of indigent persons to pauper counsel in civil cases.

At the third meeting, the Commission examined the issue of protective orders and whether the uses for protective orders should be restricted. The Commission also examined the need for instituting additional fees for civil jury trials and for civil cases involving extensive post judgment actions at the request of the litigants.

At the fourth and final meeting, the Commission examined the request for additional courts for Vigo and Dearborn Counties. The Commission also examined the issue of appellate review of State Tax Court decisions. The Commission also adopted its recommendations and a final report at this meeting.

IV. SUMMARY OF TESTIMONY

Pauper Counsel for Indigent Litigants in Civil Matters

IC 34-10-1-1 specifies that

An indigent person who does not have sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as an indigent person.

IC 34-10-1-2 specifies that

If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court shall:

- (1) admit the applicant to prosecute or defend as an indigent person; and
- (2) assign an attorney to defend or prosecute the cause.

All officers required to prosecute or defend the action shall do their duty in the case without taking any fee or reward from the indigent person.

Several offenders in Department of Correction (DOC) facilities have used this statute to file

cases in trial courts for what some consider to be frivolous causes. As an example, an offender who was sentenced to life imprisonment without parole is using the statute to receive county-paid representation to contest a divorce from his wife.

More than five bills were introduced last year to address the issue by either repealing IC 34-10-1-2 or by adding restrictive language.

The following persons testified regarding the advantages and disadvantages of each option.

Senator Luke Kenley recommended repealing IC 34-10-1 because state law already provides indigent persons with the right to counsel in most areas. He also told Commission members that no other state comes close to having the mandatory law that Indiana has that requires the appointment of counsel for indigent persons in civil cases.

Senator Lanane suggested that language restricting the use of pauper counsel to circumstances specified in statute would be appropriate policy.

Representative Kuzman noted some of the problems that result when litigants represent themselves in court without legal counsel.

Representative John Ulmer told the Commission that members of the House of Representatives most likely opposed repealing IC 34-10-1-2 because they wished for the courts to examine the merits of each case prior to a decision to either appoint or not appoint an attorney to represent the indigent person.

Staci Terry, associate attorney for Gardner, Sayre & Weikart, supported making no change in the statute. She also suggested that some restrictions could be used to reduce the demand for legal services.

Larry Hession, practicing attorney in Hendricks County, noted that the pauper counsel statute has been underutilized in the past, but predicts that more attorneys will be appointed under this statute as more offenders in DOC facilities become aware of its existence.

Jeff Baldwin, practicing attorney in Hendricks County, told the Commission members that if IC 34-10-1-1 and IC 34-10-1-2 are left intact, the state as well as counties will likely incur significant expenses. This is because individuals also have the right to be represented on appeal before the Indiana Court of Appeals and the Supreme Court, as well as in the trial courts.

Judge L. Mark Bailey, Indiana Court of Appeals, described the efforts of the Indiana Supreme Court to improve pro bono legal services for indigent litigants. He distributed an article that appeared in a publication of the Indiana State Bar Association that described the pro bono program in more detail.

The Use and Misuse of Protective Orders

Protective order cases involve circumstances where there exists fear of harm, or further harm,

to persons or property. Indiana's civil protective order statute, passed originally in 1983 (Pub. L. No. 311-1983, originally IC 34-4-5.1-1 *et seq.*), did not limit jurisdiction to family violence cases. Instead, the relief was available to all citizens, regardless of relationship. Consequently, the number of protective orders that have been issued for disputes other than to protect against harm have increased significantly increasing the workload for the courts and causing difficulties for local law enforcement agencies trying to enforce the orders.

Judge John Forcum, Blackford Superior Court, described the efforts of a committee composed of judges, clerks of the circuit court, and other interested parties to develop a proposal to change the state laws concerning protective orders. A copy of this document can be found at: http://www.in.gov/judiciary/judges/jud_center/po.html. During his presentation, Judge Forcum described to the Commission members the goals that the Protective Order Committee of the Judicial Conference of Indiana sought to accomplish and the basic reforms that the Committee proposed.

Laura Berry, executive director of the Indiana Coalition Against Domestic Violence (ICADV), told the Commission members that she was an active participant in the committee that Judge Forcum described. She distributed the results of a questionnaire that was prepared by the Coalition concerning domestic violence issues. Ms. Berry also discussed the issue of how federal legislation restricting firearms when a divorce occurs and a protective order has been issued could affect law enforcement officers who are in the process of completing a divorce. She indicated that an exemption clause exists that permits an officer to carry a service weapon while on duty.

Rep. Ralph Foley told the Commission members that in his legal practice he has found that protective orders have been issued in too many cases involving property disputes. He told the Commission that as a result, the courts are becoming increasingly burdened by litigants wishing to seek protective orders for cases that do not involve threats of violence between domestic partners and family members. He concluded that a protective order procedure cannot be designed that addresses all problems and that protective orders should be restricted to when there are abuses in interpersonal relations.

The Need for Additional Fees in Selected Civil Cases

Mark Goodpaster, fiscal analyst for the Commission, compiled information on what other states charged for initial fees in civil matters and whether Indiana's neighboring states charged fees for either jury trials in civil cases or for additional post judgment actions.

Hon. Jesse Villalpando, Lake County Court, Civil Division, introduced members of the Lake County courts and County Council to speak on the need for additional revenue to local courts.

Hon. Jeffery Dywan, Lake Superior Court, Civil Division, told the Commission members that if the General Assembly enacts new fees, any revenues from these fees should remain at the county level to help offset a portion of the county operating costs.

Troy Montgomery, member of the Lake County Council, described how the Lake County Council has reduced expenditures to the county general fund and testified in support of additional court fees that would remain at the county level.

Tom O'Donnell, vice president of the Lake County Council, also supported an increase in fees paid for access to the courts.

Lilia Judson, executive director of the Division of State Court Administration, Indiana Supreme Court, told the members of the Commission that redocketed cases for which fees should be assessed are difficult to define. She told the Commission members that the General Assembly needs to precisely define what type of cases that fees for post judgment actions should apply.

Appellate Review of Tax Court Decisions John Laramore, Chairman of State Board of Tax Commissioners, testified to the Commission concerning the right to appeal decisions made by the State Tax Court.

Additional Court in Vigo County Judge Michael Eldred, Vigo Superior Court 1 testified concerning the need for a new court in Vigo County. He told the Commission members that while the county's workload has increased, no additional courts have been created in Vigo County in 25 years.

Additional Court in Dearborn County Judges James Humphrey and Michael Witte and Richard Butler, president of Dearborn County Bar Association all appeared before the Commission on Courts to describe the need for a new court in Dearborn County. During CY 2000, Dearborn County ranked the highest of all counties in the need for an additional court.

Additional Magistrate in Madison County Judge Dennis Carroll testified that several of the judicial officers in Madison County are court commissioners paid by Madison County instead of the state. He indicated that if these court commissioners were excluded from the workload mix, the utilization rate would increase Madison County to a much higher level.

Additional Magistrate in Pike County

Circuit Court Judge Lee Baker and Small Claims Referee Mike Chesnut both appeared before the Commission to discuss the need for converting a Small Claims Referee to a magistrate position. Pike County is a small county with a limited tax base.

Salaries of Judicial Officers

Judge Paul Mathias, Indiana Court of Appeals, testified before the Commission concerning the need for a salary increase for judicial officers in Indiana.

Reaffirmation of Recommendations Made in 2000

The Commission reviewed the recommendations, but took no testimony on proposals that the Commission adopted in 2000. The Commission compared the recommendations to the laws enacted in the 2001 session of the General Assembly for the following:

- Public availability of jury lists.
- An additional superior court in DeKalb County.
- An additional superior court in Howard County.
- An additional full-time, state-paid magistrate to be shared by the circuit and superior courts in LaPorte County.
- A part-time small claims referee for Henry Superior Court No. 2.

- Conversion of partially county-paid juvenile magistrates to fully state-paid magistrates.

V. COMMITTEE FINDINGS AND RECOMMENDATIONS

Right to Pauper Counsel in Civil Matters

Findings:

- (1) State law already provides indigent persons with the right to counsel in a significant number of areas.
- (2) Several offenders in Department of Correction (DOC) facilities have used this statute to file cases in trial courts for what some consider to be frivolous causes.
- (3) When litigants represent themselves in court without legal counsel, court schedules can become congested because the litigants do not comply with filing deadlines and are not aware of the rules of the court.
- (4) Courts are able to determine whether a case is frivolous and can decide whether to assign a pauper attorney.
- (5) Courts can reduce the need for court-appointed attorneys in civil actions by basing eligibility on strict income guidelines, requiring that the use of local programs be exhausted before the court would appoint counsel, and providing free legal education programs for targeted individuals.
- (6) More attorneys need to become involved in pro bono work.

Recommendations: *The Commission voted 8 to 0 to recommend a bill that would specify that a court may assign an attorney if a person is impoverished according to the Federal Poverty Guidelines,.*

However, this presumption is rebutted if the court finds that the person:

- *has financial resources available to employ private counsel without imposing a financial hardship on the person or the person's family;*
- *is voluntarily unemployed or under employed;*
- *is owed money or other assets in an amount sufficient to employ private counsel;*
- *is impoverished due to incarceration; or*
- *is unlikely to prevail on the person's claim or defense.*

The Use and Misuse of Protective Orders

Findings:

- (1) The use of protective orders should be limited to protecting victims of family violence and their children.

(2) Title 34 protective orders are often not very effective in resolving disputes between neighbors or providing actual protection to those parties. There are currently more appropriate remedies available for non-domestic disputes, such as mediation/community dispute resolution centers (IC 34-57-3), injunctions (Trial Rule 65), trespass actions, evictions, criminal charges, etc.

Recommendations: *The members voted 8 to 1 to approve the work currently being completed by the Protective Order Study Committee of the Judicial Conference of Indiana.*

The Need for Additional Fees in Selected Civil Cases

Findings:

1) County expenditures on court operations have increased at a faster rate than county revenues generated by the court systems. In CY 1988, court revenue recovered almost 50% of the expenditures for court operations. In CY 2000, court revenues recovered 42% of expenditures for court operations.

2) Civil trials which involve juries and cases where litigants request additional post judgment decisions are appropriate cases for assessing additional fees. The four states surrounding Indiana all charge a fee for civil jury trials and for post judgment actions.

3) The General Assembly needs to precisely define the types of cases for which a fee would be assessed since some cases may require additional actions at the discretion of the courts, rather than because of a litigant's request for additional actions.

4) Proceeds from these fees need to stay at the county level to allow the counties to recover larger portions of court expenditures.

Recommendation: *The Commission felt that the Governor's current proposal would address this need for additional revenues and likely necessitate various changes in court administration which would customarily fall within this Commission's purview. The Commission has not had time to examine the proposal and anticipates that legislative committees may need to act during the 2002 session without these changes having been reviewed by the Commission on Courts.*

Appellate Review of Tax Court Decisions

No findings or recommendations were made by the Commission concerning this issue.

The Need for Additional Courts in Vigo and Dearborn Counties:

Findings: Based on the 2000 weighted caseload statistics prepared by the Division of State Court Administration of the Supreme Court, Vigo and Dearborn Counties are among the ten counties with the most severe need for additional court officers..

Recommendation: *The Commission voted 8 - 0 to recommend that legislation be introduced in the 2002 General Assembly to create new courts for Vigo and Dearborn Counties.*

The Need for Additional Magistrates in Madison and Pike Counties:

Findings: The need for additional court state-paid officers in both Madison and Pike Counties has fiscal justification. In the case of Madison County, several of the judicial officers who help in hearing cases and assist in issuing judicial decisions are paid from the county general fund. The policy of the Commission on Courts should be for the state and not the county to pay for

additional court officers when they are justified by caseload statistics. In the case of Pike County, the creation of a magistrate position would be used to substitute for a state-paid small claims court referee and increase flexibility for the Pike Circuit Court. The additional cost to the state would be \$18,000 for the difference in salaries of a magistrate (\$72,000) and a small claims referee (\$54,000).

Recommendation: *The Commission voted 8 - 0 to recommend that legislation be introduced in the 2002 General Assembly to create new magistrates for Madison and Pike Counties.*

Additional Courts and Court Officers (Reaffirmed from the 2000 Final Report)

Findings:

(1) In 1999 and 2000, the Commission on Courts recommended that the General Assembly address the need for additional court officers after considering the judicial district and county case load management plans that were under consideration by the Supreme Court.

(2) The Commission finds that judicial district and county case load management plans have been approved by the Supreme Court for each county.

(3) The case load management plans have not fully alleviated the need for additional judicial personnel.

(4) Based on the 1999 weighted caseload statistics prepared by the Division of State Court Administration of the Supreme Court, DeKalb County, Howard County, and LaPorte County are among the ten counties with the most severe need for additional court officers.

(5) The case load management plan for Henry County contemplates the addition of a small claims referee in Henry Superior Court No. 2 to alleviate a backlog of small claims cases in that court and the elimination of a county-paid commissioner. IC 33-5-2.5-1 governs small claims referees and suggests that a statutory grant of authority is needed to authorize a court to establish the position. No statutory change is needed to authorize Henry County to eliminate the position of commissioner.

(6) The Commission finds that there is substantial local support for additional courts in DeKalb County and Howard County, including support from the local bar associations, the county commissioners, and the county councils of those counties.

(7) The DeKalb Superior Court judge indicates that the court is willing to eliminate the position of small claims referee if a second superior court is created in DeKalb County.

Recommendations:

(1) *One additional superior court in DeKalb County.*

(2) *One additional superior court in Howard County.*

(3) *One additional full-time, state-paid magistrate to be shared by the circuit and superior courts in LaPorte County.*

(4) *One part-time small claims referee for Henry Superior Court No. 2.*

In addition, the Commission recommends that the position of small claims referee in the DeKalb Superior Court be terminated.

Conversion of County-Paid Juvenile Referees to State-Paid Magistrates

Findings and Recommendations: *The Commission recommends that juvenile referees in Allen County, Elkhart County, Johnson County, Lake County, Marion County, Porter County, St. Joseph County, Vanderburgh County, and Vigo County become full-time magistrates adopted and payable in conformity with IC 33-4-7.*

Public Availability of Jury Lists

Findings and Recommendations: *The Commission recommends the preparation of legislation that would give a judge in Lake County or a county that adopts the alternative jury selection procedures added by P.L. 4-1998 the option of making a jury list confidential if the judge believes that public disclosure would endanger the safety of potential or selected jurors or lead to jury tampering.*

Judicial Salaries

Findings: The Commission makes the following findings:

- (1) Judicial salaries are set by statute.
- (2) The statute setting judicial salaries has not been amended since 1995.
- (3) An increase in the salaries of judges is needed to continue to attract high quality candidates for these positions.

Recommendations: *The Commission recommends the following:*

(1) Subject to findings (2) and (3), the state share of judicial salaries should be set as follows:

<u>Court</u>	<u>Proposed Salary</u>
<i>Circuit, superior, municipal, county, and probate court</i>	<i>\$105,000</i>
<i>Judge of the Court of Appeals</i>	<i>125,000</i>
<i>Justice of the Supreme Court</i>	<i>130,000</i>

(2) The above amounts are to be in addition to the \$5,000 subsistence allowance annually provided to the Chief Judge of the Court of Appeals and to the Chief Justice of the Supreme Court.

(3) If a bill that increases judicial salaries for circuit, superior, municipal, county, and probate courts also eliminates the discretionary \$5,000 maximum county supplement payable to these judges, the state-paid salary of circuit, superior, municipal, county, and probate court judges should be \$110,000.

(4) The above recommended increases in salaries would be funded by an increase in court fees.

(5) A state-wide commission to examine the salaries of judicial officers should be created.

Funding for Drug Courts

Findings: The Commission finds the following:

(1) The development of drug courts to deal with non-violent drug offenders has the potential to reduce recidivism, reduce inmate populations, and improve the chances that the offender will become a productive citizen.

(2) The Supreme Court has submitted a proposal to the State Budget Agency seeking funding for a state-wide initiative to provide grants to counties that operate a drug court.

Recommendations: *The Commission recommends that the General Assembly fund the Supreme Court drug court grant initiative in the amount of \$300,000 per fiscal year.*

WITNESS LIST

Right to Pauper Attorney in Civil Cases:

Senator Luke Kenley
Representative John Ulmer
Staci Terry, Associate Attorney, Gardner, Sayre & Weikart
Larry Hession, Practicing Attorney in Hendricks County
Jeff Baldwin, Practicing Attorney, Hendricks County

Additional Court Fees in Civil Cases:

Mark Goodpaster, Fiscal Analyst for the Commission
Hon. Jesse Villalpando, Lake County Court, Civil Division
Hon. Jeffery Dywan, Lake Superior Court, Civil Division
Troy Montgomery, Member, Lake County Council
Tom O'Donnell, Vice President, Lake County Council
Lilia Judson, Executive Director, Division of State Court Administration

Use and Misuse of Protective Orders:

Judge John Forcum, Blackford Superior Court
Laura Berry, Executive Director, Indiana Coalition Against Domestic Violence
Representative Ralph Foley

Need for Additional Courts or Court Officers in Vigo, Madison, Dearborn and Pike Counties:

Judge Michael Eldred, Vigo Superior Court 1
Judge James Humphrey Dearborn Circuit Court
Judge Michael Witte Dearborn Superior Court
Richard Butler, President, Dearborn County Bar Association
Judge Dennis Carroll Madison Superior Court 1
Pike Circuit Court Judge Lee Baker
Pike County Small Claims Referee Mike Chesnut

Appellate Review of Tax Court Decisions:

John Laramore, State Board of Tax Commissioners

Judicial Salaries:

Judge Paul Mathias, Indiana Court of Appeals